

¹ At oral argument before the Board, the parties agreed that the award in Docket No. 251,609 was for claimant's functional impairment and not a work disability as listed in the ALJ's award paragraph. The parties further agreed that the award in Docket No. 261,308 was for the left knee instead of the right knee as

The respondent requests review of the nature and extent of claimant's disability. Respondent argues the claimant has sustained only temporary aggravations to his back and knee. Consequently, respondent argues that no additional permanent partial disability compensation should be awarded.

Claimant argues he sustained his burden of proof and the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's functional impairment, if any, in each docketed case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In Docket No. 251,609, the claimant suffered injury on January 25, 2000, when the steering on the forklift he was operating "locked" and claimant had to exert extra effort turning the forklift to avoid hitting a trash container. The claimant alleged injury to his back, shoulders and neck.

In Docket No. 261,308, the claimant suffered injury on February 17, 2000, when the forklift he was operating ran over something on the floor which caused his left foot to slip off the forklift onto the floor which twisted his left knee. Claimant further argues that favoring the left knee caused the right knee to become symptomatic.

Docket No. 261,308

Claimant's treatment was primarily focused upon his back complaints following the injury on January 25, 2000, which is the subject of Docket No. 251,609. Claimant was examined on June 21, 2000, by Dr. David J. Clymer for treatment for his back complaints and an MRI of claimant's back was ordered. On July 17, 2000, Dr. Clymer noted that MRI did not reveal disk herniation and recommended conservative treatment for claimant's back. However, Dr. Clymer did recommend arthroscopic evaluation of claimant's left knee. Although authorization for the recommended arthroscopic procedure was not provided, the doctor continued to provide medications for claimant's knee complaints. But by March 13, 2001, Dr. Clymer concluded that claimant's bilateral knee complaints had become diffuse and not particularly isolated to either knee. Consequently, the doctor doubted that arthroscopic evaluation of the left knee would result in any significant improvement.

On August 14, 2001, claimant was examined by Dr. Daniel M. Downs upon referral from claimant's personal physician. Dr. Downs noted claimant's complaint of left knee pain began following the incident when claimant's forklift ran over something on the floor which twisted claimant's knee. The doctor recommended continued pain medications for claimant's chronic pain syndrome. Ultimately, Dr. Downs opined claimant suffered a 10 percent permanent partial functional impairment to the left knee and a 5 percent permanent partial impairment to the right knee.

On September 9, 2003, at respondent's attorney's request, Dr. Clymer examined the claimant to provide an opinion regarding claimant's permanent impairment. The doctor opined that claimant suffered a 2 percent permanent partial functional impairment in each knee but qualified that opinion by stating that he could not attribute those impairments to any specific work-related activity.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁴

Initially, it should be noted that the more contemporaneous medical records indicate that claimant complained of left knee pain. Although there was later mention in the records of right leg pain it was not specifically related by history to a work-related accident. Dr. Clymer concluded the right leg complaints were not related to a work incident and neither Dr. Downs nor Dr. Clymer offered an opinion that the right knee complaints were the natural and probable consequence of claimant favoring the left knee. The ALJ concluded and the Board agrees, claimant failed to meet his burden of proof to establish he suffered a functional impairment to his right knee as a result of his work-related accident on February 17, 2000.

The claimant consistently complained of left knee pain following the February 17, 2000 incident at work. During the course of treatment, an arthroscopic evaluation of the left knee was at one point recommended by Dr. Clymer. Dr. Downs opined claimant suffered a 10 percent functional impairment to the left knee. Dr. Clymer opined claimant

² K.S.A. 44-501(a).

³ K.S.A. 2001 Supp. 44-508(g).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 rev. denied 249 Kan. 778 (1991).

suffered a 2 percent functional impairment to the left knee but concluded such impairment was not related to the work-related accident. The ALJ concluded the claimant met his burden of proof to establish he suffered a 7 percent functional impairment to his left knee. The Board agrees and affirms.

Docket No. 251,609

The parties agreed claimant had a preexisting 10 percent impairment to the back as established by Dr. Edward J. Prostic's testimony. Dr. Downs opined claimant suffered a 20 percent functional impairment as a result of his back injury. Dr. Clymer opined claimant suffered a 10 percent functional impairment to his back. But Dr. Clymer concluded this rating preexisted and claimant's back accident did not cause additional permanent functional impairment. Dr. Gregory L. Hummel opined claimant suffered a temporary aggravation but no additional permanent functional impairment as a result of his back injury.

The ALJ did not consider Dr. Hummel's deposition because of "claimant's objection to the multiplicity of experts." It is unclear from the record but the ALJ noted Dr. Hummel was selected, following preliminary hearing, to determine the nature of claimant's need for additional medical treatment. That preliminary hearing order required respondent to provide a list of three physician's from which claimant would select the provider. Further comments in the record appear to indicate the respondent selected Dr. Hummel. The Board concludes the ALJ erred in disregarding the doctor's testimony.

Both Drs. Downs and Clymer provided authorized treatment to the claimant. Thus, even if Dr. Hummel was merely an expert engaged by respondent to provide testimony in this case he would have been the only such expert hired by respondent. There is simply no multiplicity of experts for the respondent. While the proffer of excessive cumulative evidence may, under appropriate circumstances, be limited, this is simply a case where that has not occurred. Accordingly, the Board will consider Dr. Hummel's deposition testimony and determine the weight to be accorded such evidence.

The Board does not find Dr. Hummel's opinion that claimant suffered a temporary aggravation persuasive. Dr. Hummel examined claimant on March 28, 2002, and claimant was still working. Both Drs. Downs and Clymer performed later physical examinations of claimant and noted that claimant's complaints persisted which refutes Dr. Hummel's opinion such back condition was temporary.

Dr. Clymer last examined claimant on September 9, 2003, and concluded claimant suffered a 10 percent permanent partial functional impairment to his back. The doctor testified:

Q. (By Mr. Greenbaum) Go ahead. You can start reading now.

A. I felt that Mr. Pauley's presentation was consistent with some chronic preexisting impairment with regard to the lumbar spine. I felt that he had ongoing subjective complaints and back irritability. According to the AMA Guidelines, Fourth Edition, he's probably most accurately in a DRE category which would actually be a 5 percent impairment rating. I think his subjective complaints are a bit more vigorous than that. He does have a little bit of loss of range of motion and he's also been rated in the past at higher than that. Taking all those things into consideration, I estimated his impairment at 10 percent of the body as a whole related to the back. He does have some subjective complaints in the region of the cervical spine, but I did not find any evidence of objective permanent impairment with regard to the cervical spine.⁵

Dr. Clymer concluded that claimant's accident had not resulted in any additional permanent functional impairment. Conversely, Dr. Downs last examined claimant on March 12, 2003, and concluded claimant suffered a 20 percent functional impairment to his back.

The Board notes that claimant was injured in late 1980 and rated by Dr. Prostic in 1990. Dr. Prostic then converted his previous rating to a 10 percent rating pursuant to the AMA *Guides*⁶. That is the 10 percent preexisting impairment to the back that the ALJ deducted from the current back impairment. While it is recognized that Dr. Clymer concluded all the impairment was preexisting, nonetheless, the doctor provided claimant with a 10 percent functional impairment to the back. Conversely, Dr. Downs provided claimant with a 20 percent functional impairment to the back as a result of the January 25, 2000 accident.

It is essentially undisputed that until the accident on January 25, 2000, the claimant was able to perform his job duties without restriction and without medical treatment. Claimant now has a chronic pain syndrome which demonstrates that his condition worsened after the January 25, 2000 accident at work. The Board finds claimant has a 15 percent permanent partial functional impairment to the back as a result of the work-related accident on January 25, 2000. After deducting the 10 percent preexisting impairment the claimant is entitled to compensation for the additional 5 percent impairment to the back. The 5 percent functional impairment for the back coupled with the 6 percent cervical functional impairment results in a 10 percent permanent partial whole body functional impairment. The ALJ's award is modified accordingly and affirmed in all other respects.

AWARD IN DOCKET NO. 261,308

⁵ Clymer Depo. at 14-15.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 22, 2004, is affirmed.

AWARD IN DOCKET NO. 251,609

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 22, 2004, is modified to provide for a 10 percent permanent partial functional impairment to the body as a whole.

The claimant is entitled to 41.5 weeks of permanent partial disability compensation at the rate of \$383 per week or \$15,894.50 for a 10 percent functional disability, making a total award of \$15,894.50 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 30th day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director